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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE GUADALUPE ROMERO-ARREOLA,

Defendant and Appellant.

F076188

(Super. Ct. No. BF167156A)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Retired Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Peña, Acting P.J., Smith, J. and DeSantos, J.

INTRODUCTION

Appellant Jose Guadalupe Romero-Arreola stands convicted of multiple offenses, including two counts of attempted carjacking. Appellant contends the evidence is insufficient to support the attempted carjacking convictions. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

The Kern County District Attorney filed a nine-count complaint against appellant on April 7, 2017. Appellant was charged in count 1 with driving under the influence causing bodily injury; in count 2 with hit and run; in counts 3 and 4 with attempted carjacking in violation of Penal Code[1] sections 215, subdivision (a) and 664; in count 5 with resisting an executive officer; in count 6 with being under the influence of a controlled substance; in count 7 with interference with a police dog; in count 8 with resisting arrest; and in count 9 with driving without a valid license.

Testimony at trial established that on the evening of January 31, 2017, Joshua Burke was driving his Toyota Prius on Highway 58 in the left lane; his then two-year-old son was in the back seat. He saw lights come up behind him "really fast." The lights were "getting closer and closer pretty rapidly." It was as if the lights "were in my back seat." Burke was hit from behind and "felt the force of [his] car jolt forward."

Burke lost control of his car and "felt another force hit" his car again. Burke did not know if it was the same vehicle that hit him or another one. Burke's car hit the divider and eventually came to a stop. Burke's son was screaming; Burke was trying to get to his son and pull the boy from the car. The boy's car seat was rear facing and had been facing the back of the car on impact. The "back end" of the Prius had been pushed "pretty well into" the back seat of the Prius. Burke and his son were both injured.

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1 References to code sections are to the Penal Code.

The driver of the vehicle that hit Burke did not stop, but others on the highway stopped to render assistance.

Diana Powers also was driving on Highway 58 at the time; her vehicle was an Elantra Hyundai. Powers was signaling to move into the left lane and travelling at about 70 to 75 miles per hour. Another car was "outrageously speeding" and "weaving in and out of traffic." The speeding car looked like a Cadillac. The Cadillac was "speeding past everybody." The driver that was speeding hit the back of the Prius, twice. Powers did not see any brake lights from the Cadillac prior to it hitting the Prius.

The Cadillac did not stop after hitting the Prius. Powers pulled over to the right of the highway and called 911. The front end of the Cadillac was caved in and it looked like the "radiator had exploded." She saw the Cadillac proceed along the freeway and eventually come to a stop just past Union bridge.

Kade Willis and his girlfriend were in a Scion X.D. on Highway 58. He passed the Toyota Prius after the collision, but "got stuck behind the broken down car in the middle of the freeway." The car was "smoking and sitting in the middle of the freeway." Willis stopped 10 or 15 feet behind the vehicle.

Willis was waiting for a break in traffic, so he could get around the stopped vehicle, when the driver of the stopped car came over to him and gestured for Willis to get out of his car. The driver said something in Spanish. Willis rolled his window down about two inches and asked the driver to repeat what he had said.

The driver came over to Willis's car; he was walking "aggressively and gesturing with his hands." The gesture was "kind of like get out of the car." The driver appeared angry, hostile, and aggressive. The driver pulled the door open on Willis's Hyundai "two feet or so" before Willis was able to close the door. Willis thought the driver was trying to steal his car. Willis saw a break in traffic, pulled away, and drove off. Willis's girlfriend called 911.

Willis described the driver of the stopped vehicle as Mexican, about five feet ten inches, overweight, shirtless, and wearing khakis. Willis identified appellant as the man who had opened the Hyundai's door and gestured for Willis to get out of his car.

Josefina Garza also was on Highway 58 driving a PT Cruiser. She came upon a car stopped in the middle of the road, so she stopped behind it. There was a man coming from the driver's side of the stopped vehicle towards her. The man came up to Garza's vehicle and reached for the door handle of her car. The man tried to open her car door, but it was locked. The man then tried to pull her window open. Garza thought the man wanted to get into her car and wanted her to get out.

Garza identified appellant as the man who approached her car. Garza was scared. She was positioned too close to the stopped vehicle to quickly move her car and get away. Police officers arrived and ordered appellant to move away from Garza's vehicle.

California Highway Patrol (CHP) Officer Phillip Kasinger arrived at the location of the Prius. There were other CHP vehicles and emergency personnel at the scene. Kasinger passed the Prius and went further along the freeway. He pulled up to where a PT Cruiser and a Cadillac were stopped on the highway, which was "at least" half a mile from the Prius.

Kasinger saw damage on the Cadillac and a man standing at the driver's door of the PT Cruiser. The man was "yanking on [the] door." Kasinger identified the man as appellant. Kasinger got out of his patrol car, advanced toward appellant, and gave "commands to get on the ground." Kasinger had to give the command to get on the ground "more than ten" times. Appellant appeared angry; his muscles appeared to be tense.

Appellant started to "clinch his fists, and then he started advancing towards" Kasinger. Kasinger described appellant's manner as very aggressive. Kasinger pointed his Taser at appellant and turned it on. He pulled the trigger and the probes hit appellant.

The effect was not enough to disable appellant; he kept advancing towards Kasinger. Kasinger pulled the trigger of the Taser again, to deploy the second cartridge.

Kasinger was in the "middle of the fourth pull, fourth [Taser] cycle" before another officer arrived. Kern County Sheriff's Deputy Bassett and his canine partner, Hero, had arrived and Hero jumped toward appellant. The dog missed appellant and ended up disconnecting the Taser wires.

Hero jumped again and latched onto appellant's left leg. Bassett came forward and pushed appellant to the ground; appellant grabbed Hero and was shaking the dog. Appellant was laughing and yelling at the same time. Kasinger attempted to place handcuffs on appellant but he rolled onto his back with arms beneath him. More officers arrived, and it took five or six officers to restrain appellant.

Kasinger opined that appellant exhibited all the signs of drug intoxication at the scene. A blood test confirmed that appellant had 337 nanograms per milliliter of cocaine and 2,663 nanograms per milliliter of Benzoylecgonine in his blood; Benzoylecgonine is a metabolite of cocaine. This was one of the highest levels of cocaine in the blood the technician had seen; normally blood tested at 50 to 100 nanograms.

The defense moved for a judgment of acquittal on counts 3 and 4, which was denied. The jury found appellant guilty on all counts except count 7. A multiple victim allegation appended to count 1 was found true. The jury found appellant not guilty of count 7.

Appellant was sentenced to an aggregate term of six years in prison. Appellant filed a timely notice of appeal.

DISCUSSION

Appellant challenges the sufficiency of the evidence supporting the counts 3 and 4 convictions for attempted carjacking. Appellant argues he never gained possession of or took the vehicles, and his antecedent acts were insufficient to constitute attempted carjacking.

Standard of Review

We review sufficiency of the evidence challenges for substantial evidence. " 'Evidence is sufficient to support a conviction only if it is substantial, that is if it reasonably inspires confidence [citation], and is credible and of solid value.' " (*People v. Fromuth* (2016) 2 Cal.App.5th 91, 104.) "Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence." (*In re Michael D.* (2002) 100 Cal.App.4th 115, 126.)

In general, an appellate court resolves neither credibility issues nor evidentiary conflicts. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "[T]he reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "Reversal on this ground [i.e., insufficiency of the evidence] is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

It is appellant's burden to affirmatively establish that the evidence was insufficient to sustain the convictions on counts 3 and 4. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574.)

Sufficiency of the Evidence of Attempted Carjacking

"An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (Pen. Code, § 21a.) Thus, "When a defendant acts with the requisite specific intent, that is, with the intent to engage in the conduct and/or bring about the consequences proscribed by the attempted crime [citation], and performs an act that 'go[es] beyond mere

preparation ... and ... show[s] that the perpetrator is putting his or her plan into action' [citation], the defendant may be convicted of criminal attempt." (*People v. Toledo* (2001) 26 Cal.4th 221, 230.) "*Carjacking* is the felonious taking of a motor vehicle in the possession of another or from [his or] her person or immediate presence against [his or] her will and with the intent to either *permanently or temporarily* deprive the victim of possession of [his or] her car, accomplished by force or fear." (*People v. Marquez* (2007) 152 Cal.App.4th 1064, 1067-1068.)

Therefore, attempted carjacking requires the specific intent to take a vehicle not one's own; from the immediate presence of a person possessing the vehicle; against that person's will; using force or fear to accomplish the taking; intending to deprive that person of the vehicle either temporarily or permanently. (§ 215; CALCRIM No. 1650.) The accompanying act required is "a direct but ineffective step ¶ … ¶ that goes beyond planning or preparation and shows that a person is putting his or her plan into action," and "indicates a definite and unambiguous intent to commit [carjacking]." (CALCRIM No. 460.) A person is guilty of attempted carjacking "even if, after taking a direct step towards committing the crime, … his or her attempt failed or was interrupted by someone or something beyond his or her control." (*Ibid.*)

In the instant case, the People had the burden of proving beyond a reasonable doubt that appellant had the specific intent to permanently or temporarily deprive Willis and Garza of their cars, and that he committed a direct but ineffectual act toward that end. The evidence establishes that appellant attempted to carjack Willis's and Garza's cars because appellant's actions constituted more than antecedent, preparatory acts.

An attempt to commit a crime requires the specific intent to commit the crime and a direct but ineffectual act toward its commission. (§ 21a.) The overt act element requires more than mere preparation and must establish that the perpetrator is putting his or her plan into action; the overt act need not be the proximate or ultimate step toward commission of the crime. (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 8

(*Decker*).) Preparation consists of "devising or arranging the means or measures necessary for the commission of the offense" and the "attempt is the direct movement toward the commission after preparations are made." (*People v. Anderson* (1934) 1 Cal.2d 687, 690.) The attempt "must be manifested by acts which would end in the consummation of the particular offense unless frustrated by extraneous circumstances." (*Ibid.*)

With respect to the attempted carjacking of Willis's car, appellant came over to Willis's car; he was walking "aggressively and gesturing with his hands." The gesture was "kind of like get out of the car." Willis described appellant as angry, hostile, and aggressive. When appellant got to Willis's car, appellant pulled the door open on Willis's Hyundai "two feet or so" before Willis was able to close the door. Willis thought appellant was trying to steal his car. Willis saw a break in traffic, pulled away, and drove off, which prevented appellant from being able to complete the carjacking. Appellant's actions in gesturing to Willis to get out of the car, coupled with appellant pulling the driver's door open, constitute direct but ineffective acts toward the commission of a carjacking. (*Decker*, *supra*, 41 Cal.4th at p. 8.)

Appellant also committed overt acts in an attempt to carjack Garza's car. Garza was stopped behind appellant's vehicle. Appellant came towards her. Appellant came up to Garza's vehicle and reached for the door handle of her car. He tried to open Garza's car door, but it was locked. Appellant then tried to pull her window open. Garza thought appellant wanted to get into her car and wanted her to get out. She was positioned too close to the stopped vehicle to quickly move her car and get away. Police officers arrived and ordered the appellant to move away from Garza's vehicle. Here, appellant tried to open the driver's door of Garza's vehicle and when he discovered it was locked, he tried to forcefully pry open the driver's window. These acts go beyond mere preparation and constitute direct but ineffective acts toward the commission of a carjacking. (*Decker*, *supra*, 41 Cal.4th at p. 8.)

Appellant also contends his actions cannot constitute attempted carjacking because he did not use force or fear. However, use of force or fear is not necessary to establish attempted carjacking; the over act need not satisfy an element of the crime of carjacking. (*Decker, supra*, 41 Cal.4th at p. 8.) Appellant cites *People v. Lopez* (2003) 31 Cal.4th 1051 and *People v. Vargas* (2002) 96 Cal.App.4th 456, for the proposition that force or fear is an element of the attempted carjacking offense; however, it is an element of the completed offense of carjacking, not an attempt. Moreover, appellant's aggressive behavior did engender fear. Garza testified she was afraid of appellant. Appellant also used force to open Willis's car door and Willis testified appellant was aggressive and hostile.

Finally, appellant contends he did not commit the crime of attempted carjacking because he did not gain possession of or move either vehicle. This is not required to find an attempted carjacking. An attempted carjacking may include these elements, but it is not required that an attempt progress to the point of possessing and moving the vehicle. (*People v. Vizcarra* (1980) 110 Cal.App.3d 858, 862-863.)

DISPOSITION

The judgment is affirmed.